United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2586

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P/S

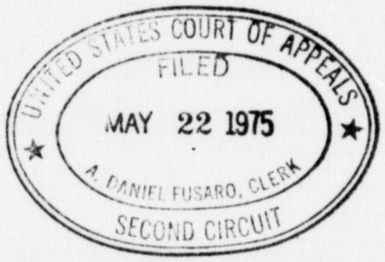
To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. WILLIAM PUTMON, Appellant, -against- ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Appellee.	Docket No. 75-2586

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



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I

The State argues that Westbrook v. Arizona, 384 U.S. 150 (1966), is not relevant to the issue of determining the standard of competence necessary to enter a guilty plea. The State's reading of Westbook misapprehends its necessary impact. Westbrook was examined and found competent to stand trial. He then proceeded to trial pro se. The Supreme Court

ordered a second examination to determine his competence to waive counsel and his competence to conduct his own defense. Thus, the Supreme Court was not satisfied that the mere finding of competence to stand trial was sufficient to establish competence to waive the constitutional right to counsel and to understand and protect the rights associated with a trial -- confrontation, burden of proof, Fifth Amendment, etc.

As indicated in appellant's main brief, entry of a plea of guilty constitutes a waiver of substantial constitutional rights coincident to a trial, including the right to a jury, the right to have the prosecution prove guilt beyond a reasonable doubt, the Fifth Amendment protection against self-incrimination, the right to confrontation, the right to call witnesses. Thus, a valid plea of guilty is conditioned on knowing and cognitively understanding the same rights Westbrook had to understand in order to conduct his own defense. Competence both to enter a plea of guilty and to conduct a defense without an attorney involve understanding much more difficult and abstract concepts than the mere ability to confer with counsel and to plan a defense with the assistance of counsel.

The State argues that the reexamination ordered in Westbrook did not establish a new standard, but merely another inquiry. The State's argument misses the point. However phrased -- as a new standard, or as a quantitatively different appraisal of understanding or comprehension -- the judge in

this case did not make the necessary finding. The standard set forth in Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), simply implements this obligation to make an appropriate finding.

II

In his main brief, appellant argues that the conflicting reports concerning appellant's competence before Judge Conway in 1971 required the court sua sponte to order a hearing to determine appellant's competence to stand trial and that the hearing held in the District Court three years later could not substitute for the failure to hold such a contemporaneous hearing.

The State misconstrues appellant's argument by stating that appellant's position is that a third mental examination (Appellee's Brief at 14-16) was required. It is a hearing that was required, necessitated by the evidence before the State court in 1971.*

The cases cited by the State are inapposite to this case. In United States v. Cook, 418 F.2d 321 (9th Cir. 1969),** the defendant was examined pursuant to 18 U.S.C. §4244 and found competent within two months of his trial. There was no con-

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*In fact, in light of Dr. Dvorin's report which concluded that appellant was incompetent, a third mental examination without a hearing would have been inadequate.

**Cited in Appellee's Brief at 14.

flicting psychiatric report before the trial court. Moreover, during the course of the trial, a hearing was held contemporaneously with counsel's claim of Cook's incompetence. Additionally, the trial court's determination of Cook's competence was based on the testimony of doctors who had recently testified at Cook's trial, the observation of the defendant's demeanor during that portion of the trial which had been completed as well as the §4244 report and testimony of Cook's doctor. Most important, the issues involved in Cook and in this case are different. This case involves the responsibility of the court sua sponte to hold a competency hearing, not whether the State court abused its discretion in not ordering a new psychiatric examination.

It is significant that Meador v. United States, 332 F.2d 935 (9th Cir. 1964), cited in Cook, was not mentioned by the State. In Meador, a §4244 examination was held five months prior to a trial in connection with a criminal charge unrelated to the trial. A psychiatric hearing followed the §4244 report, and was held three and a half months prior to the trial. The Court held that a new, contemporaneous examination on the specific criminal charge involved at the trial was necessary.

The other cases cited by the appellee in support of the irrelevant issue of a mental examination are also inapposite. Jordan v. Wainwright, 457 F.2d 338, 339 (5th Cir. 1972), denied a sanity hearing because there was no evidence to justify the hearing beyond counsel's assertion that he had difficulty

communicating with the defendant. United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2d Cir. 1972), denied a hearing on the defendant's competence to enter a plea because the only formal psychiatric evaluations indicated competence. Additionally, there was no substantial contrary evidence to cause the court to doubt the correctness of the report involved. Likewise, in United States ex rel. Rizzo v. Follette, 367 F.2d 559 (2d Cir. 1966), the only psychiatric report indicated that the defendant was competent.

Moreover, in this case, the hearing held in the District Court three years later did not cure the defect in the proceeding which occurred in 1971. This case comes within the rule of Pate v. Robinson, 383 U.S. 325, 387 (1966), and Drope v. Missouri, 43 U.S.L.W. 4248, 4254 (Sup.Ct., February 19, 1975), that an incompetency hearing years after the event in question is insufficient since, in this case, reconstruction of appellant's mental competence at the time of entry of his guilty plea is impossible. Indeed, the same factors which caused the Supreme Court to reject an after-the-fact determination of competence in Pate are present here. "The jury would not be able to observe the subject of their inquiry [at the critical juncture in time], and expert witnesses would have to testify solely from information contained in the printed record." Pate v. Robinson, supra, 383 U.S. at 387. It is clear that this is the case here.

During the course of the hearing held in the District Court, Dr. Iapaolo was asked if he would describe the procedure normally followed in a case like this (22*). Correcting appellant's trial attorney, the District Court admonished Dr. Iapaolo to describe the procedure followed in this case. Dr. Iapaolo ignored this warning, however, and described the general procedure employed in 1971.** Likewise, Dr. Iapaolo had no independent recollection of the number of times he examined appellant.*** Appellee even admits that little factual evidence was adduced at the District Court hearing not already in the printed record of Iapaolo's report ("E" to appellant's separate appendix) (see Appellee's Brief at 7).

The cases cited by the State involving a competency hearing are either inapposite or distinguishable. United States ex rel. Mayo v. LaVallee, 73 Civ. 2626, affirmed without opinion (2d Cir. 1974),**** does not deal with the issues involved in this case. There, the District Court stated:

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*Numerals in parentheses refer to pages of the transcript of the District Court hearing.

**"Yes, usually the procedure at this time was that the Chief of the Unit will see thepatient" (22).

***"In '71 I don't recall exactly how many times I saw him. I guess two or three times I am sure I saw him, but I don't remember exactly how many times, you know, daily in 1971. I have no recollection" (24; emphasis added).

****That case, affirmed by this Court by summary order dated March 19, 1974, cannot be used as precedent. United States v. Joly, 493 F.2d 672, 676 (2d Cir. 1974).

> The crime indicated no evidence of a mental abberation and the evidence at trial raised none of the "bona fide doubt" which would require the court to hold a competency inquiry under Pate v. Robinson ....
>
> United States ex rel. Mayo v. LaVallee, 70 Civ. 2202 (S.D.N.Y. 1971) (Lasker, J.) at 15.

In Miranda v. United States, 458 F.2d 1179, 1182 (2d Cir. 1972), there was evidence contemporaneous with the plea from which a determination could be made. Here, whatever evidence existed was in conflict and was not contemporaneous with the plea. Moreover, the determination in Miranda involved the defendant's incompetence based on his claim that he was a drug addict, was suffering withdrawal symptoms, and was under heavy sedation. That determination involved concurrent physical observations (watering of the eyes, lethargy) which were capable of being communicated from memory, and therefore did not lose their probative value over the long period involved.

United States v. Valentino, 283 F.2d 634 (2d Cir. 1960), was decided prior to Pate v. Robinson, supra, 383 U.S. 325.

In Lee v. Alabama, 406 F.2d 466, 471 (5th Cir. 1969), both the transcript of a sanity hearing which held Lee sane and a witness able to testify about Lee's demeanor at his trial were available.*

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*In spite of the Fifth Circuit's assertions in Lee that these circumstances would allow witnesses to testify not solely from the record, it is difficult to imagine that testimony twenty years after the fact is based on independent recollection and would not violate Pate and Drope. Although not stated

III

In response to appellant's position that it was error for the State trial court not to hold a hearing to determine appellant's competence, the State places great reliance on counsel's failure to request a further examination or assert appellant's incompetence (Appellee's Brief at 13-15). As noted previously, appellant is not arguing for further examination, but for a hearing, required by the conflicting examinations already conducted.

Moreover, Drope v. Missouri, supra, 43 U.S.L.W. at 4252, and United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972), cases cited in appellee's brief, make clear that counsel is to be relied upon to some extent to bring the evidence of appellant's competence into focus in order to determine whether sufficient evidence existed to require a hearing.* Here the evidence of appellant's incompetence could not be clearer since it was attested to in the report submitted by Dr. Dvorin.

(Footnote continued)

by the court, perhaps justification for the decision in Lee can be found in the court's assumption that Lee was trying to make his numerous habeas corpus applications fit the current state of the law. Lee v. State of Alabama, 386 F.2d 97, 104 (1967).

* See v. Robinson, supra, 383 U.S. 325, indicates that once substantial evidence exists, the court must decide the issue of competence at a hearing.

CONCLUSION

For the foregoing reasons and the reasons set out in the main brief for appellant, his application for writ of habeas corpus should be granted and he should be permitted to withdraw his guilty plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 2, 1975

I certify that a copy of this reply brief for appellant has been served by mail on the Attorney General of the State of New York.

Jonathan J. Silbermann